AMERICAN CONSTITUTIONALISM

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice: Punishments: The Death Penalty

**Reynolds v. Florida**, \_\_\_ U.S. \_\_\_ (2019).

*Michael Reynolds brutally murdered three persons. Florida law at the time of his trial mandated that a jury make an advisory recommendation and the judge impose the death penalty only if the judge agreed with the recommendation and the judge found at least one aggravating factor that justified capital punishment. After Reynolds was sentenced to death, the Supreme Court in* Hurst v. Florida *(2016) declared that this procedure unconstitutionally required trial judges to make a fact-finding, namely whether an aggravating factor existed. The Florida Supreme Court nevertheless refused to grant Reynolds a new trial on the grounds that, given the brutality of his murders and the unanimous jury recommendation for death, the judicial factfinding was harmless error. Reynolds appealed to the Supreme Court of the United States.*

 *The Supreme Court denied certiorari. Three justices, however, issued statements on the constitutionality of the death penalty generally and the constitutionality of Reynolds death sentence in particular. Justice Stephen Breyer claimed that at a certain point, the delays between sentencing and execution amount to cruel and unusual punishment. Justice Clarence Thomas blamed such delays on capital defense lawyers and erroneous Supreme Court decisions. Who has the better of this argument? Justice Sonia Sotomayor claimed that the Court should require juries to impose the death sentence rather than make advisory recommendations. Why does she make this claim? Is this another example of proponents of capital punishment dragging out the death sentencing process or a sincere constitutional claim?*

Statement of Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I9c29f425e74e11e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9c29f425e74e11e8bc5b825c4b9add2e) respecting the denial of certiorari.

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Many of the Florida death penalty cases in which we have denied certiorari in recent weeks involve—directly or indirectly—three important issues regarding the death penalty as it is currently administered. *First,* these cases highlight what I have previously described as a serious flaw in the death penalty system: the unconscionably long delays that capital defendants must endure as they await execution. Henry Sireci, the petitioner in one case we recently denied, was first sentenced to death in 1976. He has lived in prison under threat of execution for nearly 42 years. . . . The Court has recently denied petitions from at least 10 other capital defendants in Florida who have lived under a death sentence for more than 30 years, and from at least 50 other capital defendants who have lived under a death sentence for more than 20 years. I have previously written that lengthy delays—made inevitable by the Constitution’s procedural protections for defendants facing execution—deepen the cruelty of the death penalty and undermine its penological rationale. . . . [B]ecause the petitioners in these cases did not squarely raise the delay issue, I do not vote to grant certiorari on that basis here.

*Second,* . . . .

*Third,* several of the cases in which we deny certiorari today, including this one, indirectly raise the question whether the Eighth Amendment requires a jury rather than a judge to make the ultimate decision to sentence a defendant to death. . . . [T]the defendants in these cases were sentenced to death under a scheme that required the judge to make the ultimate decision to impose the death penalty, and in which the jury was repeatedly instructed that its recommended verdict would be advisory. . . . I believe that this scheme violates the Eighth Amendment. Because juries are better suited than judges to “express the conscience of the community on the ultimate question of life or death,” the Constitution demands that jurors make, and take responsibility for, the ultimate decision to impose a death sentence.

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. . . [T]he three issues raised by these cases draw into focus a more basic point . . . : A death sentence should reflect a jury's “community-based judgment that the sentence constitutes proper retribution.” It seems to me that the jurors in at least some of these cases might not have made a “community-based judgment” that a death sentence was “proper retribution” had they known at the time of sentencing (1) that the death penalty might not be administered for another 40 years or more; (2) that other defendants who were sentenced years later would be entitled to resentencing based on a later-discovered error, but that the defendants in question would not be entitled to the same remedy for roughly the same error; or (3) that the jury's death recommendation would be treated as if it were decisive, despite the judge's instruction that the jury's recommendation was merely advisory. Had jurors known about these issues at the time of sentencing, some might have hesitated before recommending a death sentence. . . .

The flaws in the current practice of capital punishment could often cast serious doubt on the death sentences imposed in these and other capital cases. Rather than attempting to address the flaws in piecemeal fashion, however, I remain of the view that “it would be wiser to reconsider the root cause of the problem—the constitutionality of the death penalty itself.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I9c29f425e74e11e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9c29f425e74e11e8bc5b825c4b9add2e), concurring in denial of certiorari.

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Justice BREYER's first concern is “that the death penalty might not be administered for another 40 years or more” after the jury's verdict. That is a reason to carry out the death penalty sooner, not to decline to impose it. In any event, petitioner evidently is not bothered by delay. Petitioner has litigated all the way through the state courts and petitioned this Court for review three separate times. He can avoid “endur [ing]” an “unconscionably long dela[y],” “by submitting to what the people of Florida have deemed him to deserve: execution.” “It makes ‘a mockery of our system of justice for a convicted murderer, who, through his own interminable efforts of delay has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.’ ” It is no mystery why it often takes decades to execute a convicted murderer. The “labyrinthine restrictions on capital punishmen[t] promulgated by this Court” have caused the delays that Justice BREYER now bemoans. . . .

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Justice BREYER's third concern is that petitioner was “sentenced to death under a scheme that required the judge to make the ultimate decision to impose the death penalty, and in which the jury was repeatedly instructed that its recommended verdict would be advisory.” Contrary to Justice BREYER's suggestion that the jury did not feel an adequate sense of “responsibility” for its recommendation, the jury was instructed that a “ ‘human life is at stake’ ” and that the trial court could reject the jury's recommendation “ ‘only if the facts [are] so clear and convincing that virtually no reasonable person could differ.’” . . .

Justice BREYER's final (and actual) concern is with the “ ‘death penalty itself.’ ” As I have elsewhere explained, “it is clear that the Eighth Amendment does not prohibit the death penalty.” The only thing “cruel and unusual” in this case was petitioner's brutal murder of three innocent victims.

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I9c29f425e74e11e8bc5b825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9c29f425e74e11e8bc5b825c4b9add2e), dissenting from denial of certiorari.

I begin by acknowledging that petitioners have been convicted of gruesome crimes. Their victims, and the families and communities of those victims, have suffered. I am cognizant of their suffering. I am also mindful that it is this Court's duty to ensure that all defendants, even those who have committed the most heinous crimes, receive a sentence that is the result of a fair process. It is with that responsibility in mind that I analyze the petitioners' challenges.

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. . . . In practice, . . . the Florida Supreme Court's harmless-error approach appears to reflect a myopic focus on one factor: whether the advisory jury's recommendation for death was unanimous. Because the jurors in pre-*Hurst* cases were informed that they should recommend death only if they determined that sufficient aggravating factors existed and outweighed the mitigating factors, the Florida Supreme Court has reasoned that a jury that unanimously recommended death necessarily made the findings that *Hurst* said are constitutionally required. By concluding that *Hurst* violations are harmless because jury recommendations were unanimous, the Florida Supreme Court “transforms those advisory jury recommendations into binding findings of fact.”

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In *Caldwell v. Mississippi* (1985), this Court said it is “constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.” . . . *Caldwell* explained that this Court has “always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its ‘truly awesome responsibility.’” Where a sentencing jury is encouraged to proceed without that awareness, *Caldwell* suggests that “there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences.”

[T]he sentencing scheme in place in Florida when petitioners were sentenced placed the final responsibility with the trial judge. Juries were instructed accordingly. Thus although the jury in this case was instructed that the court would reject a recommendation “only if the facts [we]re so clear and convincing that virtually no reasonable person could differ” and that a “human life [wa]s at stake,” the jury also was told that its duty was to “advise the court” and that “the final decision as to what punishment shall be imposed [wa]s the responsibility of the judge.” The jury also heard, repeatedly, that it was to “recommend” an “advisory sentence.” . . .

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. . . [T]he Florida Supreme Court said that its application of the harmless-error rule does not entirely turn on jury unanimity. To be sure, in some cases the Florida Supreme Court has mentioned factors other than unanimity to support a finding of harmlessness. But in many other cases, the court's analysis started and ended with the unanimity of the jury's recommendation. Indeed, on the very day that the Florida Supreme Court decided this case, it treated jury unanimity as dispositive in four other capital cases*.* . . .

Second, the state court dismissed *Caldwell* as inapplicable to cases like petitioners' because the pre-*Hurst* jury instructions accurately described the advisory role assigned to the jury by state law at that time. It is true that *Caldwell* 's holding invalidates only those sentences imposed following comments that “*mislead* the jury as to its role in the sentencing process.” But whether or not *Caldwell* itself makes the petitioners' sentences unconstitutional, the reasoning in *Caldwell* surely informs the related question whether a purely advisory jury recommendation is sufficiently reliable for a court to treat it as legally dispositive for purposes of harmless-error review. *Caldwell* provides strong reasons to doubt that a jury would have reached the same decision had it been instructed that its role was not advisory. . . .

“[T]his Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State.” The jurors in petitioners' cases were repeatedly instructed that their role was merely advisory, yet the Florida Supreme Court has treated their recommendations as legally binding by way of its harmless-error analysis. This approach raises substantial Eighth Amendment concerns. As I continue to believe that “the stakes in capital cases are too high to ignore such constitutional challenges” . . . .